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No. 88-332 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

AMOS E. REED,

Petitioner,

v.

GUENTER MANNHALT,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defense attorney in a criminal case has a conflict of interest where the State's primary witness against the defendant accused the defense attorney of being directly involved in the same criminal conduct for which the defendant is on trial.

2. Whether the fact that defense counsel did, in fact, pay $1,000 in cash to buy a gold watch from his client under circumstances similar to those alleged by the State's primary witness, created an additional conflict of interest in a prosecution alleging robbery and possession of stolen jewelry.

3. Whether the conflicts of interest described in paragraphs 1 and 2, above, "adversely affected (the) lawyer's performance" based upon any of the following factors, all of which occurred at the defendant's trial:

(a) Where the defense attorney, because of his representation of the defendant, was unavailable as a witness to rebut, deny or explain the allegations of illegal conduct made by the State's primary prosecution witness;

(b) Where the prosecution was seriously interested in prosecuting defense counsel and even in seeking the defendant's cooperation against his attorney, but was precluded from doing so because of the fact that defense counsel represented the defendant;

(c) Where defense counsel deliberately avoided asking his client, during the defendant's testimony, whether the allegation that counsel bought stolen property from the defendant was true;

(d) Where defense counsel engaged in a highly improper and inflammatory exhibition in front of the jury by cross-examining the State's primary witness about the allegation, and by calling his wife forward in the courtroom to ask her whether the jewelry she was wearing was stolen;

(e) Where defense counsel has admitted, and the prosecutors involved in the case have testified under oath, that defense counsel was personally

outraged and concerned about the allegation of his criminal conduct "ruining" his reputation as a lawyer.

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STATEMENT OF THE FACTS

The most significant and blatant omission in the State's Petition for Writ of Certiorari is the failure to quote even a single word from the relevant portions of the transcript of Respondent's trial.

Instead, the State conveniently chooses to rely upon the deposition testimony in federal court from the two prosecutors who tried the case against Respondent Mannhalt. These hindsight descriptions by the prosecutors who have a vested interest in upholding Respondent's convictions fail to do justice to the serious conflicts of interest that burdened defense counsel at trial and led to his outlandish behavior in front of the jury.

Respondent Mannhalt's alleged involvement in this series of robberies first came to light on November 7, 1980, when the State's primary witness, Tommy Morris, was arrested for a robbery that was eventually charged against Respondent. After his arrest, Mr. Morris tried to "cut a deal" for himself by volunteering to implicate Guenter Mannhalt in that crime and numerous others, according to the police report of Morris' post arrest

interview. See CR 27 (Appendix); ER 125 for a complete copy of this critical police report, which is quoted extensively below.

This police report documents conversations in which "the prosecutor would like to offer TDM (Tommy Morris) a lesser sentence if he would testify against GM (Guenter Mannhalt)." In another conversation, two hours later, Mr. Morris "agreed to testify against GM" but indicated that he "wants to walk from all charges if he testifies." In the same conversation, Morris volunteered to "identify some of the jewelry that is in evidence (the jewelry that came from GM's safe)," a reference to jewelry which later formed the basis for charges of robbery and possession of stolen property against Mannhalt, and which had been seized from the safe at his donut shop pursuant to a search warrant.

The next entry in this police report documents another conversation with Morris that occurred two days later and listed twelve cases of theft or robbery Morris and his cohorts committed, allegedly at the direction of Respondent Mannhalt, about which he volunteered to testify in exchange for leniency. One of these entries reads as follows:

> 11-9-80 1900 Hrs. - TDM to our office for further discussion. He will give information re the following:
>
> * * *
>
> 11. Attorney James Kempton purchased a stolen ring $1200 with $100 bills; taken from Lake Washington area. Also purchased a stolen bracelet.

As noted above, Morris agreed, as part of a generous plea bargain, to provide information not only against Guenter Mannhalt, but also against his attorney, James Kempton, who eventually represented Mannhalt in defense against all the charges Morris testified about.

The full extent and seriousness of attorney Kempton's conflict of interest blossomed at trial when Kempton cross-examined Morris extensively about Morris' accusation that Kempton had purchased stolen jewelry from Respondent Mannhalt, at the same donut shop where police seized the allegedly stolen property that formed the basis of the charges against petitioner in Counts XIII-XVI. Even though the State never asked Morris about the accusation on direct examination, Kempton brought it up on cross and asked Morris about the critical police report which contained Morris' accusation against Kempton. Kempton asked Morris whether he "told the police a lot of phony stuff to save your skin, didn't you?" To this, Morris answered "No, sure didn't." Id. at C-102, ER 102. The following, outrageous exchange then occurred:

> Q (by Kempton): Didn't lie to them at all?

A (by Morris): No.

Q: Tell you what, Tommy, would you just tell the jury now like you told the police about the stolen ring I bought with hundred dollar bills?

A: You did.

Q: I did?

A: Sure, you did.

Q: Let's just hear about it. What kind of ring was it?

A: I don't know. You bought a ring.

Q: I bought a ring?

A: With hundred dollar bills. I was there.

Q: You were there?

A: Yeah. I didn't see you get the ring, but I was sitting in there when he came back in from selling you that ring in your car. Now, say I wasn't there. Now, you say I wasn't there, because you did.

Q: Well, I checked my car, so--

A: You bought it for your wife. You did.

Q: I bought a diamond ring from your wife?

A: For your wife.

Q: For my wife? What's it look like?

A: It was a ring that was no good. It was nothing but some glass. You bought it, you got it for $1200. You have it checked when you go home.

Q: $1200?

A: That's right. You go have it checked. You ain't got nothing but some glass.

Q: My wife's here now.

A: Yeah.

Mr. Kempton (to the spectator's section): Come up here, will you? Are you wearing any rings?

Unidentified spectator: Yes. I hope they're not glass.

Mr. Redkey: Your Honor, I'm going to object to this line of questioning --

Mr. Kempton: No, he's telling the police I'm buying stolen goods. I'm proving he's a liar.[1]

A (by Morris): How can you prove that I'm a liar on that? How?

---

[1]Of course, the jury was instructed that statements of counsel are not evidence in the case. Jury Instruction 53, CR 1, ER 43.

> Q: Just listen to you, Tommy.
>
> The Court: Things are coming a little unglued here, a bit out of order.
>
> Q (by Mr. Kempton): You just like to put it wherever you can, don't you?
>
> A: Just like you, just like you.
>
> Q: I'm going to stand up here and talk about stolen rings I bought for my wife, and I --
>
> A: Why wouldn't you? I'm not--

Id. at C-102-104, ER 102-104.

Kempton persisted in this cross-examination for several more pages, even to the point of waving the police report containing the accusation in front of the jury. Id. at 105-106, ER 105-106. Many of the above-quoted references were repeated, including a direct quote from the police report which Kempton read to the jury as follows: "Attorney James Kempton purchased a stolen ring, $1200 with hundred-dollar bills taken from the Lake Washington area." To which Morris responded: "That ain't

right. I said that, I did say that. I said that, though, I said that maybe two weeks ago. I said, 'yeah, he was walking around with a hot ring hisself.'" Id. at C-105-106, ER 105-106.

Morris then volunteered "every time I see you coming in you got something" following which Kempton asked "when did you see me in the Donut Shop?" to which Morris responded "you'd be surprised." Id. ER 108. Morris elaborated by providing details about the various times he saw Kempton at the donut shop where the jewelry in evidence had been seized, and he repeated once again his description of when he "seen (Kempton) drive up. I was standing right there looking at you. He went outside and came back in with $1200. He had the ring when he left, but he didn't have it when he came back. So that's what I thought, he said you did it." Id. at C-110, ER 110. This was followed by yet

another description of the entire scenario of Kempton buying stolen jewelry from Mannhalt, including his claim that the ring was a phony and that Kempton's wife was "going to be mad" when she found out. Id. at C-110, ER 110.

Prosecutors Evans and Redkey were both deposed in the habeas corpus proceeding below. In his deposition, Mr. Redkey described the foregoing exchange as follows:

> Well, that remark, by the judge, was made, I believe, at some point after my objection to Kempton calling his wife forward from the back of the courtroom, which I saw to be highly irregular conduct. I had certainly never seen anything like that occur in a court of law, nor have I since. It was clearly an unusual tactic. And I would say that the longer it continued, the more it did appear to be out of control, and I was trying to bring the trial judge's attention to that point, which he ultimately did. I think that is when he said things were coming unglued here; when we had a spectator commenting on the record, who was not a sworn

> witness, and counsel engaging in conversation with her.

Id. at B-39-40, ER 78-79. Redkey testified that Kempton's wife walked "right up toward the middle of the courtroom," and "raised her hand and displayed a diamond ring." Id. at B-40-42, ER 81.

Mr. Kempton himself admitted that "I did, perhaps, lose my composure . . . I was visibly shaken and I was furious. The court cannot appreciate the furor one feels when being confronted by an absolute thieving liar and saying that one is the purchaser of stolen items." ER 184.

In defense against the habeas corpus petition, the State submitted an affidavit from Mr. Kempton in which he admitted, for the first time ever, that he did purchase a gold watch for $1,000 from petitioner, at petitioner's donut shop, during the relevant time period described by Tommy Morris. Kempton Affidavit at p. 6, ER 179-180. In his affidavit, Kempton describes

it as "a gold Omega wristwatch which I thought was absolutely beautiful," and further states "I somehow recall Guenter saying it was a black pimp" who had provided the watch to Mannhalt. Interestingly, Kempton began his outrageous cross-examination of Tommy Morris, a black man, by asking "You're a pimp, aren't you, Tommy?" Trial transcript at 85, ER 85. Kempton states in his affidavit: "I asked him what he wanted for the watch and he said $1,000. I was taken aback but Guenter advised me it was a $2,000 watch." Kempton Affidavit at p. 6, ER 179.

REASONS FOR DENYING THE WRIT: CERTIORARI IS INAPPROPRIATE BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS FUNDAMENTALLY CORRECT, WELL FOUNDED IN FACT, AND TOTALLY CONSISTENT WITH A LONG LINE OF DECISIONS FROM THIS COURT AND THE VARIOUS CIRCUIT COURTS OF APPEAL.

In its Petition, the State argues that the Ninth Circuit holding "is in direct conflict with the state of the law . . . and the pronouncements of the United States

Supreme Court." However, this assertion is nonsensical since the Ninth Circuit applied precisely the same legal standard to the undisputed facts of this case that Petitioner argues it should have applied. In its thoughtful and thorough decision, the court quoted and utilized this Court's well established legal standard from Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) that requires a new trial where defense counsel "actively represented conflicting interests" and where the conflicts "adversely affected his lawyer's performance," (quoting Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). See Opinion at page A-7 of State's Petition.

The State also argues that the Ninth Circuit's holding "erroneously adopted a blanket rule that a conflict of interest automatically exists whenever an attorney

is accused of crimes similar or related to those of his client." On the contrary, the Ninth Circuit found four distinct ways that defendant Mannhalt demonstrated that the conflicts of interest "adversely affected his lawyer's performance":

> The second prong of Cuyler is whether the conflict adversely affected counsel's performance. Here, Morris' accusation against Kempton adversely affected Mannhalt's representation in four areas: (1) Kempton's failure to testify to rebut Morris' allegations, (2) Kempton's cross-examination of Morris, (3) Kempton's failure to question Mannhalt on direct about the allegations, and (4) Kempton's failure to explore possible plea bargains.

(See Opinion at page A-10 of State's Petition). These four factual findings are discussed in detail over the following several pages of the court's opinion, and are well supported by the record of the trial, as summarized above.

A. CONFLICT OF INTEREST

A defendant who "shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, supra, at 349-50. Accord: Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985).

In Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), this Court explained the reasons why prejudice need not be shown where a claim of ineffective assistance is based on defense counsel's conflict of interest with his client:

> . . .it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics and decision in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require,

> unlike most cases, unguided speculations.

Holloway v. Arkansas, supra, 435 U.S. at 490-91. Accord: Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Government of Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir. 1984).

In Strickland v. Washington, supra, this Court noted that claims of ineffective assistance based upon conflict of interest give rise to a "limited, presumption of prejudice." Id. at 692. In explaining this presumption of prejudice the court set forth the following test:

> Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance."

Id., at 692 quoting Cuyler v. Sullivan, supra. The court justified a presumption of prejudice in these circumstances because:

> In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Id. (emphasis added).

The Ninth Circuit applied these well established legal standards to the facts of this case and concluded, quite correctly, that defense counsel Kempton "actively represented conflicting interests" which "adversely affected his . . . performance." These adverse effects are discussed below.

B. ADVERSE EFFECTS ON DEFENSE COUNSEL'S PERFORMANCE

(1) Defense Counsel Should Have Been Available As A Witness.

The Ninth Circuit found that: "First, Kempton should have disqualified himself so as to be available to testify and dispute Morris' testimony about the stolen ring." See App. to Petition at A-10. After discussing relevant Canons of the Ethics and pertinent case law, the Ninth Circuit made the following finding:

> Kempton's testimony may have been independently admissible to show Morris' motive - i.e. Morris was so desperate to get a plea bargain that he would even fabricate criminal conduct by Kempton. Moreover, Morris' accusations against Mannhalt and Kempton were factually intertwined. His accusations against both attorney and client were part of the same conversation with police officers and were documented in the same police report. In addition, Mannhalt was tried for possessing stolen property seized from his donut shop. Morris accused Kempton of buying stolen property at this same donut shop and Kempton admits that he bought a gold watch there.

> Even if Kempton's testimony would have been inadmissible, his cross-examination of Morris put his own and his wife's unsworn testimony before the jury. Kempton told the jury that he did not buy a stolen ring. Although the jury was instructed not to consider these comments as evidence, Kempton put himself in the position of arguing his own credibility, precisely what DR 5-102(A) seeks to avoid. Accord Iorizzo, 786 F.2d at 57 (whether or not attorney testified, his firsthand involvement would cause any argument to jury about testimony to be viewed as a statement of a witness as well as of an advocate).

Id. at A-11.

The Ninth Circuit's finding that Mr. Kempton should have been available to explain or deny the allegations Tommy Morris made against him is certainly correct. It is fundamental that any evidence tending to discredit a cooperating witness by showing his bias or motive to fabricate evidence against petitioner in order to protect himself would have been admissible. Davis v. Alaska, 415 U.S. 308,

94 S.Ct. 1105, 39 L.Ed.2d 34 (1974); Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). False statements by a prosecution witness would always be admissible, especially where they pertained to plea bargaining efforts to obtain leniency. Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); United States v. Hitchman, 609 F.2d 1098 (5th Cir. 1979).

Provisions of the Code of Professional Responsibility require that defense counsel refuse employment or withdraw from any case where the attorney ought to be called as a witness. Canon Five dictates that "a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness," subject to three exceptions which are not at all applicable to this case. DR 5-101. Disciplinary rule 5-102(A) dictates that counsel must withdraw if he learns, in

the course of the litigation, that he ought to become a witness:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of a client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, . . .

except as provided in the same exceptions which, as noted, are not applicable here.

Ethical Consideration 5-9 elaborates upon the policy reasons behind this mandatory prohibition:

> An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 notes that, "when the question arises, doubts should be resolved in favor of the lawyer testifying

and against his becoming or continuing as an advocate."

Numerous cases closely on point make it clear that, where defense counsel ought to have been available as a witness in defense of his client, a new trial must be ordered. United States v. Iorizzo, 786 F.2d 52 (2nd Cir. 1986) (cited and discussed by the Ninth Circuit below); Commonwealth v. Rondeau, 392 N.E.2d 1001 (Mass. 1979); Comden v. Superior Court of L.A. County, 145 Cal. Rptr. 9, 576 P.2d 971 (1978); United States v. DeLuna, 584 F. Supp. 139 (W.D.Nev. 1984); United States v. Snyder, 707 F.2d 139 (5th Cir. 1983); Government of Virgin Islands v. Zepp, supra; United States v. Kwang Fu Peng, 766 F.2d 82 (2nd Cir. 1985). See, generally, Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev., 1244 at 1289-1291 (1981) and 1776 Associates, Inc. v. Lazrus, 416 N.Y.S.2d

162 (1979); Norman Norell, Inc. v. Federated Department Stores, 450 F. Supp. 127 (S.D. N.Y. 1978); Eurocom, S.A. v. Mahoney, Cohen and Co., 522 F. Supp. 1179 (S.D. N.Y. 1981); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D. N.Y. 1981).

Finally, the record clearly shows that Mannhalt was never advised of this conflict or its detrimental effects. As noted in the Ninth Circuit opinion:

> We add a final note. The prosecution here was fully aware before Mannhalt's trial began of Morris' accusation against Kempton. The prosecution, therefore, had ample opportunity to bring the potential conflict to the trial judge's attention and move for disqualification if appropriate. Such a process would have also enabled Mannhalt if he so desired to waive any conflict on the record after adequate warning. We trust that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.

Petition at A-10 to A-11.

(2) Failure to Question Defendant About the Accusation.

The Ninth Circuit found another adverse effect on defense counsel's performance based on the following:

> Third, having brought out Morris' accusation on cross, Kempton could have asked Mannhalt about it on direct examination. Mannhalt suggests Kempton did not do so because he feared the prosecution would elicit on cross that Kempton had purchased a watch from Mannhalt. Kempton claims that Morris had been so thoroughly discredited that no further refutation was necessary.
>
> After reviewing the cross-examination, we are not convinced that refutation by Mannhalt was unnecessary. As noted above, the jury could have inferred from Kempton's emotional cross-examination that Morris' accusation was true. This impression may have been bolstered by the fact that neither Kempton nor Mannhalt denied the allegation in sworn testimony. Kempton's decision not to question Mannhalt thus may have been affected by Kempton's personal concerns.

Petition at A-12. Kempton had good cause to be worried about the effect of questioning his client about his purchase

of jewelry at Mannhalt's donut shop. Such questions would have embarrassed Kempton professionally or even subjected him to prosecution.

(3) Defense Counsel's Concern as a Potential Suspect Affected His Actions in Plea Negotiations.

The Ninth Circuit made the following finding:

> Finally, because Kempton was the target of the same criminal investigation, he may not have pursued a plea bargain in which Mannhalt would agree to testify against Kempton. Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest. See Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)

Petition at A-12. Obviously, defense counsel Kempton had strong personal interests that arose from Tommy Morris' accusation and conflicted with those of Respondent Mannhalt. First, and foremost, he was an actual target of the same criminal investigation against his client.

This was verified by state prosecutor Duane Evans at his deposition:

> First, when I was made aware of this (Morris' accusation against Kempton), I went, "Bingo." And I will not go into this in great length but, clearly, I had been told for many years previous that your client was an important fence. You could sit outside and see stuff go in. One of the big questions everybody has always had was where did it go? You know, very simple.
>
> Well, if you could show that he had a clientele of upper-class, professional people in town, that would explain a lot of things. So, as a prosecutor, I was terribly interested in this piece of information. And I cannot speak for the police, I have no idea, but I know I leaned on them hard to do everything they could to chase that down, put it to rest, one way or the other.

Richard Hansen Affidavit at App. A-42-43 (testimony of Duane Evans, emphasis added), CR 26, ER 66.

At his deposition Evans made it clear that he would have prosecuted Kempton if at all possible, even if this required

"turn[ing] the tables and offer[ing] Guenter (Mannhalt) a deal":

> Q: Mr. Evans, relative to Mr. Morris' accusation against Mr. Kempton, did you ever see that as a conflict of interest for Mr. Kempton?
>
> A: Initially, I did. Clearly, if there was any merit to it, he could not -- number one, he was going to get prosecuted if I could corroborate, maybe even turn the tables and offer Guenter a deal. Look, and this is straight, I would have done so. Maybe not against all the charges, but we would have made some accommodation. But so, yes, there was a potential conflict there, . . .

Hansen Affidavit at App. C-64, CR 26, ER 70 (emphasis added).

Plea bargaining has been recognized as "an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260, 30 L.Ed.2d 427, 432, 92 S.Ct. 495, 498 (1971). This Court has clearly held that the requirements for effective assistance of counsel extend to the plea bargaining

process. Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 209, 106 S.Ct. 366, 370 (1985). See also, Johnson v. Duckworth, 793 F.2d 898 899 (7th Cir. 1986). The mere failure to advise a client of a plea bargain offer constitutes ineffective assistance of counsel. See Johnson v. Duckworth, supra, United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982); United States ex rel. Simon v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972); People v. Brown, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); Harris v. State, 437 N.E.2d 44, 45-46 (Ind. 1982); Commonwealth v. Napper, 254 Pa. Super. 54, 385 A.2d 521, 10 A.L.R.4th 1 (1978); see generally Annot., Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R.4th 660 (1981). The standard is whether there is a reasonable probability

that but for an attorney's error, a defendant would have accepted a plea agreement. Hill v. Lockhart, supra.

In Holloway v. Arkansas, supra, 435 U.S. at 490-491 this Court specifically noted that "to assess the impact of a conflict of interest on the attorney's option tactics and decisions in plea negotiations would be virtually impossible." (Emphasis added). However, the record in this case does make it obvious that petitioner's counsel had a strong incentive to prevent any such plea negotiations to protect himself at the expense of his client. A more serious conflict of interest could not be imagined.

In United States v. McLain, 823 F.2d 1457 (11th Cir. 1987) the court reversed the RICO, conspiracy, extortion, and drug convictions against several defendants because the defendant discovered, after his conviction, that his attorney was under

investigation for two HOBBS Act violations before and during Sher's trial. Although the attorney was not indicted until after the defendant had been convicted, the defendant argued on appeal that his attorney's knowledge that he was under investigation "created a conflict of interest, which reduced Johnson's effectiveness as Sher's counsel, thereby depriving Sher of his Sixth Amendment rights." 823 F.2d at 1463. The court concluded: "We find that an actual conflict of interest did exist . . . Although Johnson (the attorney) testified that he was not worried about the investigation, his client, having hired Johnson for his sterling reputation would have reacted differently." Id. at 1464. The court noted there was a "conflict between his (the attorney's) desires to aid his client and save himself," and specifically noted that:

> Johnson's competence was most lacking in the area of plea negotiations.
>
> * * *
>
> Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). Although the Justice Department's response to this possible action on Sher's behalf is uncertain, the fact that Sher was neither informed of Johnson's conflict of interest, nor counseled toward this avenue of plea negotiations should be weighed in Sher's favor.

823 F.2d at 1464. Accord: Government of Virgin Islands v. Zepp, supra.

Moreover, "the general competence" of a lawyer is irrelevant in any case where the claim of ineffective assistance is based on a conflict of interest. Zepp, 748 F.2d at 2165. Accord: United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) (defendant's Sixth Amendment right to effective assistance of counsel violated

per se where defense counsel may have engaged in criminal conduct related to the conduct for which defendant was on trial); United States v. Kwang Fu Peng, supra, (prosecution witness, on cross-examination, accused defense counsel of threatening him during a post-indictment meeting); United States v. Salinas, 618 F.2d 1092 (5th Cir. 1980) (attorney was potential "target" of investigation regarding events for which the defendant had been indicted). Uniformly, courts have held that defense counsel must be disqualified in any case where he is accused of misconduct. United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), United States v. Castellano, 610 F. Supp. 1151 (S.D.N.Y. 1985).

(4) Defense Counsel's Concern About His Reputation Caused His Outrageous Behavior.

The Ninth Circuit found another adverse impact on defense counsel's performance based on the following:

> Once Kempton decided to question Morris, both he and Mannhalt had an interest in undermining Morris' credibility. The manner of the cross-examination indicated, however, that Kempton was motivated, at least in part, by personal concerns. The examination was by all accounts unorthodox. Kempton admitted that he was shaken and furious. Kempton's emotional performance may have effectively discredited Morris in the eyes of the jury. It is equally likely, however, that the jury viewed Kempton's anger as implying that Kempton and possibly his client were involved in illegal conduct. Kempton's personal feelings about Morris' allegation may have thus adversely affected his performance.

Petition at A-12. In defense counsel Kempton's own affidavit he stated: "The court cannot appreciate the furor one feels when being confronted by an absolute thieving liar and saying that one is the

purchaser of stolen items." Kempton Affidavit at p. 11, ER 184. His associate, Deborah Youngblood, stated "Mr. Kempton was upset and angry that he was being implicated." CR 27, ER 22.

Even the prosecutors testified that Mr. Kempton was extremely upset and concerned about the effect the accusation would have on his reputation:

> And Kempton was, as I recall, trying to reinforce his allegation that Morris was a liar by saying, you know, "I know he's a liar. I have personal knowledge he's a liar, because I didn't buy that stolen ring, or at least not with knowledge that it was stolen."
>
> I think, also, that Jim Kempton later asked me whether I believed the allegation. I think he was concerned about his reputation that this allegation would be made, and did I believe it.

Richard Hansen Affidavit at App. B-52 (testimony of Bill Redkey), CR 26, ER 83. Prosecutor Evans testified that Kempton stated: "God, won't that ever go away," and "It's absolute hogwash." Id. at 55, CR

26, ER 69. According to Evans: "At some point in time, there was a 'you son of a bitch, you are going to ruin my reputation,' and I said, 'yes, but I am required under Brady to give you that, don't you understand that. I have to give it to you.'" Id. at 55, CR 26, ER 69.

Whenever an attorney has made a choice between alternative courses of action based upon considerations other than the best interests of his client, a new trial must be ordered. United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983). When the choice involves a conflict between the interests of the attorney and his client, the situation is intolerable.

II. CONCLUSION

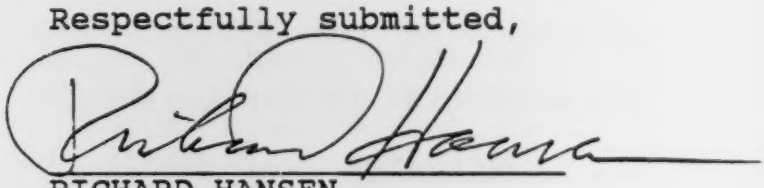
Contrary to the State's argument, the Ninth Circuit did apply the well established test for ineffective assistance of counsel based upon a conflict of interest, as set forth in Cuyler v.

Sullivan, supra. Moreover, the Ninth Circuit found a compelling factual basis to support its conclusion that defense counsel's conflict of interest had at least four actual and well documented adverse influences on the attorney's performance at trial.

Accordingly, this case presents neither a factual nor legal basis to justify review by the United States Supreme Court, and the Petition should therefore be summarily denied.

DATED this 21st day of September, 1988.

Respectfully submitted,



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